

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT HENRY TESSMER, JR.,

Petitioner,

v.

STEVE SMITH, Acting Warden,

Respondent.

No. 2:24-cv-1500 CSK P

ORDER TO SHOW CAUSE

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2022 murder conviction. On June 3, 2024, petitioner was directed to file, within thirty days, an amended petition raising only exhausted claims. More than thirty days have passed, and petitioner has not filed an amended petition or otherwise responded to the Court's June 3, 2024 order. Petitioner is ordered to show cause why the unexhausted ineffective assistance of counsel claim should not be stricken, and this action proceed on the remaining three claims that petitioner has exhausted. In the alternative, petitioner may file a motion to stay this action while he returns to state court to exhaust the ineffective assistance of counsel claim.

Background

Petitioner raises four claims in his petition: (1) There is no evidence of prior planning activity; (2) There is some evidence of motive; petitioner was provoked when the victim took a

1 swing at petitioner; (3) There is no evidence of a particular and exact means and manner of killing
2 indicating a preconceived design; and (4) Ineffective assistance of counsel. (ECF No. 1.)

3 Petitioner did not raise his ineffective assistance of counsel claim (claim four) in the
4 California Supreme Court. (ECF No. 1 at 12.) On June 3, 2024, the Court found petitioner failed
5 to exhaust his ineffective assistance of counsel claim (claim four). (ECF No. 4.)

6 Discussion

7 Federal law requires any habeas claim to be presented first to the state courts in order to
8 correct any constitutional error. See 28 U.S.C. § 2254(b)(1)(A); see also Rose v. Lundy, 455 U.S.
9 509, 515-16 (1982) (explaining why federal habeas petitioners must exhaust claim by giving state
10 courts the first opportunity to correct constitutional error); O’Sullivan v. Boerckel, 526 U.S. 838,
11 845 (1999) (explaining that exhaustion requires the completion of “one complete round” of state
12 court review). Petitioner may proceed on his exhausted claims by amending the petition to delete
13 the unexhausted claim. See Rose, 455 U.S. at 510, 520-21 (stating that a petitioner who files a
14 mixed petition may “resubmit[] the habeas petition to present only exhausted claims”); see also
15 James v. Giles, 221 F.3d 1074, 1077-78 (9th Cir. 2000) (finding petitioner may delete his
16 unexhausted claim from a mixed petition rather than suffering dismissal of the petition). Because
17 petitioner failed to amend his petition, petitioner is directed to show cause why his unexhausted
18 claim four should not be stricken from the petition.

19 In the alternative, petitioner may request the federal court place the federal habeas petition
20 on hold while petitioner returns to state court in order to fully exhaust claim four. This is referred
21 to as a “stay and abeyance.” Federal law provides for two very different types of a stay and
22 abeyance. If petitioner opts to file a motion for stay, petitioner should specify which type of stay
23 he is seeking.

24 The first type of a stay is referred to as a “Rhines” stay. See Rhines v. Weber, 544 U.S.
25 269, 278 (2005). The court may stay a habeas petition containing exhausted and non-exhausted
26 claims if petitioner demonstrates (1) good cause for the failure to previously exhaust the claims in
27 state court, (2) the claims at issue potentially have merit, and (3) petitioner has been diligent in
28 pursuing relief. Rhines, 544 U.S. at 277-78; see also Mena v. Long, 813 F.3d 907, 910-12 (9th

1 Cir. 2016) (extending the Rhines stay and abeyance procedure to federal habeas petitions that are
2 wholly unexhausted). Petitioner must address all three of these factors if requesting a Rhines
3 stay. If the court grants the request for a Rhines stay, the entire federal habeas petition including
4 the unexhausted claims will be put on hold. No amended federal habeas petition would be
5 required.

6 The second type of a stay is referred to as a “Kelly” stay. In Kelly v. Small, 315 F.3d
7 1063 (9th Cir. 2003), a stay and abeyance involves the following three-step process: (1) the
8 petitioner amends his petition to delete any unexhausted claims; (2) the court stays and holds in
9 abeyance the amended, fully exhausted petition, allowing petitioner the opportunity to return to
10 state court to exhaust the deleted claims; and (3) petitioner later amends his petition and re-
11 attaches the newly-exhausted claims to the original petition. This is a more cumbersome
12 procedure than a Rhines stay because it requires petitioner to file multiple amended federal
13 habeas petitions, but it does not require a petitioner to demonstrate good cause for the failure to
14 exhaust. See King v. Ryan, 564 F.3d 1133, 1140 (9th Cir. 2009). However, a Kelly stay runs the
15 risk of preventing review on the merits of any unexhausted claim for relief due to the one year
16 statute of limitations governing federal habeas claims. See King, 564 F.3d at 1140-41
17 (emphasizing that a “petitioner seeking to use the Kelly procedure will be able to amend his
18 unexhausted claims back into his federal petition once he has exhausted them **only** if those claims
19 are determined to be timely. Demonstrating timeliness will often be problematic under the now-
20 applicable legal principles.”) (emphasis added); see also 28 U.S.C. § 2244(d)(1) (stating that a
21 one year period of limitation shall apply to all federal habeas petitions challenging a state court
22 judgment).

23 Nothing in this order prevents petitioner from returning to state court while this case is
24 pending. If the California Supreme Court issues a ruling on the ineffective assistance of counsel
25 claim while this federal habeas case is pending, petitioner should file a “Notice of Exhaustion” in
26 this Court along with a copy of the state court ruling.

27 Therefore, petitioner is ordered to show cause, within thirty days, why the unexhausted
28 ineffective assistance of counsel claim should not be stricken, so that this action proceeds on the

1 remaining three claims that petitioner has exhausted. In the alternative, petitioner may file a
2 motion to stay this action while he returns to state court to exhaust the ineffective assistance of
3 counsel claim. Petitioner is cautioned that failure to respond to this order will result in an order
4 striking claim four, and this action will proceed solely on petitioner's first three claims.

5 In accordance with the above, IT IS HEREBY ORDERED that petitioner is ordered to
6 show cause, within thirty days from the date of this order, why this Court should not strike
7 petitioner's fourth claim because it is unexhausted. In the alternative, within thirty days from the
8 date of this order, petitioner may file a motion to stay this action.

9
10 Dated: August 6, 2024

11 
12 CHI SOO KIM
13 UNITED STATES MAGISTRATE JUDGE

14 /1/tess1500.osc
15
16
17
18
19
20
21
22
23
24
25
26
27
28